



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

B6

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: AUG 11 2004

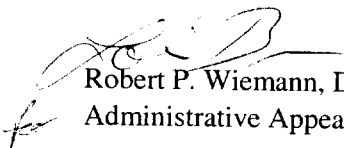
IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a hotel manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the beneficiary did not present evidence that he had the foreign equivalent of a United States bachelor's degree. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the Department of Labor's certification of the petitioner's labor certification application is prima facie evidence of the beneficiary's qualifications.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(d). In this case, that date is April 9, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of hotel manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
Grade School
High School
College 4
College Degree Required BA
Major Field of Study Marketing/Management

The applicant must also have four years of employment experience in the job offered. Additionally, Item 15 has a special requirement of Korean language fluency.

The beneficiary sets forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended [REDACTED] in Seoul, Korea from March 1970 through March 1972. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. Only an experience verification letter was provided as evidence of the beneficiary's qualifications for the proffered position.

Because the evidence was insufficient, the director requested additional evidence on February 25, 2003, specifically requesting a copy of the beneficiary's baccalaureate degree, college transcripts, and an advisory evaluation of the beneficiary's academic credentials that did not consider practical experience.

In response to the director's request for evidence, and as proof of the beneficiary's qualifications, the petitioner submitted a copy of a credential evaluation written by Carl H. Walter of International Education Council. Mr. Walter, a Ph.D. and tenured professor in the School of Business Administration at California State University, stated the following concerning the beneficiary's qualifications:

[The beneficiary's] six years of professional work experience in the positions Assistant Sales Manager Sales & Marketing Department with [REDACTED] and Senior Sales & Marketing Manager Sales & Marketing Department with Seoul Hilton Hotel (1978-1984) may be considered equivalent to two years of upper-level university-level studies in business administration with concentration in marketing management toward a four-year bachelor degree at an accredited college or university in the United States (3rd and 4th year of four-year degree).

Finally, based on the analysis of [the beneficiary's] credentials as listed in Appendix A it is my conclusion that his general and professional education and professional work experience are equivalent to the educational level attained by an individual who holds a Bachelor of Arts Degree in Business Administration with Concentration in Marketing Management issued by an accredited American college or university.

(Emphasis in original).

It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides:

[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.

A copy of the beneficiary's resume is also in the record of proceeding. The resume's section concerning the beneficiary's educational background indicates that the beneficiary attended Art College a [REDACTED] studying Literary Arts Original Work from March 1970 through March 1972. No educational transcripts, certificates, or diplomas were submitted. Counsel states in his accompanying letter that "[CIS] has already acknowledged the [beneficiary's] credentials for purposes of qualifying him for the within position vis-à-vis the H-1B Petition process."

The director denied the petition, citing 8 C.F.R. § 204.5(l)(3)(ii)(C) for the premise that work experience cannot be accepted in lieu of formal education, and stating the following:

The evaluator found that the beneficiary's experience was the equivalent of a baccalaureate degree. While the beneficiary, with this evaluation, may have qualified for the H-1B non-immigrant classification, a different set of laws apply to employment based immigrant classifications. According to 8 CFR 204.5(l)(2), professional means a qualified beneficiary who holds at least a U.S. baccalaureate degree or a foreign equivalent degree and who is a member of the professions. This petition seeks to classify the beneficiary as a professional. However, the evidence current held in the petitioner does not establish the beneficiary qualifies as professional worker.

On appeal, counsel asserts that the Department of Labor's (DOL's) certification of the petitioner's labor certification application is prima facie evidence of the beneficiary's qualifications.

At the outset, counsel is mistaken that DOL certified the beneficiary's qualifications and CIS may not analyze the beneficiary's qualifications any further. Counsel does not cite the statutory, regulatory, or precedential legal authority for his premise. Rather, in evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position; CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). DOL analyzes, supervises, and certifies the petitioner's employment offer in the labor certification process, not the beneficiary's qualifications. *See* 20 C.F.R. § 656.20 *et. seq.* CIS reviews the immigrant visa petition to determine whether the petitioner establishes eligibility for the visa petition and the beneficiary's qualifications for the proffered position. *See* 8 C.F.R. §§ 204.5(a)(1) and (2), and (l)(3)(ii)(A) *et seq.*

Additionally, even assuming, *arguendo*, that counsel's theory is correct, the supporting evidence that he submits on appeal contradicts his points. He states that he is providing advertisements that were placed in connection with the labor certification application process with DOL and that these prove that candidates were considered with

less than a bachelor's degree. It is noted that CIS has no ability to verify that the advertisements submitted on appeal correspond with the petitioner's visa petition and underlying labor certification application. Counsel submits a copy of a cover letter apparently that he submitted with the petitioner's labor certification application to DOL stating that, on April 6, 2001, he submitted "tear sheets form [sic] July 23, 2000 and the October 29, November 5 and November 12, 2000 New York Times Help Wanted Section of the Classified Advertisements." The record of proceeding at Exhibit A of the appeal contains three advertisements placed on January 28, 2001, February 4, 2001, and February 11, 2001. Counsel specifically pointed us to these ads and his cover letter but the dates do not match. Additionally, the advertisements counsel asks the AAO to consider unequivocally require a bachelor's degree for the proffered position of Hotel Manager. The ads say: "Req'd BA/BS in mkting/mgt (or equiv) 2 yrs' exp." Presumably that means a bachelor's degree *and* two years of experience, but it is not clear, especially since the position's requirements include four years of experience instead of two in addition to a bachelor's degree. Thus, counsel's assertions lack merit.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a skilled worker, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree (four years in college) in marketing/management. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. Additionally, the regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

In the instant case, the petitioner provides no evidence of the beneficiary's educational accomplishments despite the governing regulatory provisions requiring an official record. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C). The record of proceeding as it is currently comprised, lacks an official record or even lesser evidence of a baccalaureate degree program. Counsel and the petitioner concede that the beneficiary did not complete a baccalaureate degree program.

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. The director's decision on this point, and cited regulatory authority, was correct.

Additionally, the petitioner has not indicated that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification, or that experience could be accepted in lieu of no educational experience. Thus, the combination of education and experience, and experience alone, may not be accepted in lieu of education. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor to unequivocally include the

expansive interpretation of the position's requirements as counsel suggests.¹ Since that was not done, the director's decision to deny the petition must be affirmed.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses a bachelor's degree as required by the terms of the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ It is notable that the educational requirement was amended prior to DOL's final certification that resulted in a more restrictive interpretation of the position's requirements. On part 14 of the ETA 750A where "College Degree Required" is specified, "BA or equivalent" was amended to read "BA." The qualifying language "or equivalent" was deleted.